

## Survey of Advance Medical Directives

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**Advance Directive: a statement made by a patient before the onset of incapacity which indicates the patient's desire for treatment when the patient is no longer able to participate in his or her health care decisions.**

There are several types of advance directives used in Michigan, and each one serves a distinct purpose. In this article, we will review the three statutes that govern advance directives in Michigan, and also survey the different types of advance directives most commonly used, including the strengths and weaknesses of each one.

The primary statutes that deal with advance medical directives are the *Estates and Protected Individuals Code* ("EPIC"), the *Michigan Dignified Death Act*, and the *Michigan Do-Not-Resuscitate Procedure Act*.

The *Estates and Protected Individuals Code* (EPIC) contains nine sections dedicated to written Patient Advocate Designations (PAD). EPIC is Michigan's primary law regarding advance directives. A person who is authorized to make medical decisions for another individual is referred to as a "patient advocate". The requirements for creating a valid PAD are very specific, and must be followed. The PAD must be in writing, signed, dated, and witness by

two persons who are not related to the patient. It must also state that the authority of the patient advocate may only be exercised when the patient is unable to participate in his or her own medical decisions. A PAD may contain the authority to make anatomical gifts on behalf of the patient. In general, a PAD may contain any statement of the patient's desires on care, custody, and medical or mental health



treatment. However, the designated patient advocate must sign a separate statement accepting the specific duties and responsibilities required by the statute to act on behalf of a patient.

The second statute that deals directly with medical decisions is the *Michigan Dignified Death Act*, which is part of the Public Health Code. This statute requires a treating physician to inform a person with reduced life expectancy due to advanced illness about recommended medical treatment and alternatives to medical treatment, including the advantages and disadvantages of each form of treatment. The patient

must also be informed about their right to sign a PAD, and make decisions about their own care, including pain management or hospice care. This statute recognizes the authority of a “patient surrogate” to make decisions on behalf of a patient. A patient surrogate is defined as a parent, legal guardian, immediate family member, or next of kin - but it does not define their priority to act. The Michigan Department of Community Health has developed a form that contains all of the information required to be given to a patient with reduced life expectancy. Once this form is signed, the physician is relieved from liability for prescribing drugs to relieve pain or treat the advanced illness. In addition, insurance companies are prohibited from modifying the patient’s terms of health care coverage, or charging different rates for covered benefits.

Finally, the *Michigan Do-Not-Resuscitate Procedure Act* permits an adult person of sound mind to sign an order (“DNR”) with a physician directing emergency personnel not to perform CPR. The DNR must be in the form prescribed by statute, and it must be signed by two witnesses and the patient’s physician. A DNR applies only where a patient suffers spontaneous cessation of both breathing and circulation in a setting outside of a hospital, nursing home, or mental health facility. A patient may wear a DNR bracelet while the order is in effect. Emergency personnel must be made aware of the DNR by either viewing the order, or by viewing the bracelet, to withhold CPR. In either case, the patient must maintain possession of the order and make it available to emergency personnel.

Based on these statutes, and common usage, Michigan residents are faced with a variety of options for advance directives. The following types of advance directives are most frequently used even though they may not be authorized by Michigan law:

1. **Living Will** - A living will is often confused with a *last will and testament* or a *living trust*, but it serves an entirely different purpose. A living will describes the specific medical care and treatment to be provided or withheld while a person is incapacitated. It ordinarily directs health care providers to withhold life support or treatment in the event of a terminal or irreversible condition. Michigan is one of three states

without a statute specifically authorizing living wills.

*Strengths:* (1) Can be customized to meet a variety of situations. (2) Relatively simple, so may be easier to understand and draft. (3) Recognized in most states other than Michigan.

*Weaknesses:* (1) Not recognized in Michigan. (2) Does not allow the appointment of a specific person with authority to make decisions under unique circumstances. (3) No standardized form.

2. **Patient Advocate Designation (PAD)** - A “patient advocate” is person designated to make health care decisions during any time of incapacity. A PAD is a document that appoints a patient advocate to make health care decisions for an incapacitated person - including withholding treatment that may allow a person to die. PAD’s are recognized under Michigan law in the *Estates and Protected Individuals Code*. Because PAD’s are specifically recognized by Michigan statute, they are currently the most common type of advance directive used.

*Strengths:* (1) Safest way to direct medical decisions. (2) No statutory form, so a PAD can be drafted to meet a variety of circumstances. (3) Allows the appointment of one or more trusted persons to make medical decisions, including organ donation.

*Weaknesses:* (1) Patient advocate must be prepared and willing to represent the patient’s wishes, and to meet legal standards for end-of-life decisions. (2) Family members may still disagree about treatment since only one person is usually appointed as a patient advocate (more than one person may be appointed). (3) Lack of standardized forms means that the quality of documents is subject to expertise of the drafter.

3. **Family Consent** - The *Michigan Dignified Death Act* formally recognized the right of family members to terminate life support. This statute allows for dialogue among the persons closest to the patient without cumbersome formalities, especially when other advance directives are

missing. This procedure reflects the actual operation of hospitals and hospice systems where the closest relatives agree with the treating physician on the course of action for a patient with diminished capacity. The statute does not define the priority for family members to act, which may result in confusion.

*Strengths:* (1) Recognizes the rights of family members to make decisions for a person closest to them. (2) Reflects what happens in many end-of-life situations.

*Weaknesses:* (1) Patient's wishes may become subject to disagreements of family members, conflicts of interest, and inadvertent omission of relevant persons. (2) No clear priority for decision-makers to act, which may result in no action at all.

**4. Physician's Order** - The *Michigan Dignified Death Act* requires a physician to counsel a patient with advanced illness regarding their right to make decisions about end-of-life treatment. Based on this discussion, orders may be entered by a physician to direct or deny medical care. Most hospitals have patients sign a written statement concerning the risks and possible outcomes of treatment.

*Strengths:* (1) Easy to implement. (2) Usually the result of discussion with treating physician since it must be entered in medical record.

*Weaknesses:* (1) Physician's records may be inaccessible when needed outside of a hospital setting. (2) Statements made to multiple physicians may conflict with each other. (3) Not useful for patients with diminished capacity.

**5. Oral Directives** - Nine states now recognize oral directives of a patient recorded in the medical record. Oral directives are not recognized in Michigan, and specifically prohibited by statute and Supreme Court decision.

*Strengths:* (1) Easy to implement. (2) Usually the result of discussion with treating physician since it must be entered in medical record.

*Weaknesses:* (1) Lack of uniform recognition in most states, including Michigan. (2) Difficult to establish that a statement was made. (3) High probability of error regarding the substance of the statement. (4) No representative is appointed to make decisions.

**6. Hospital Policy Committee** - Hospitals must establish an ethics committee to set policies on refusal of additional treatment. In the absence of an advance directive, treatment decisions are made in the patient's "best interests."

*Strengths:* (1) Decisions made by highly trained committee members. (2) Considers the best interest of the patient without emotional attachment of family members.

*Weaknesses:* (1) Hospital-based decisions may be influenced by financial pressure due to limited resources, or limitations set by insurance carriers or Medicare guidelines. (2) Important personal decision is left to a non-family committee.

**7. Do Not Resuscitate Order ("DNR")** - A DNR is a written request not to initiate medical resuscitation in the event of a cardiac arrest. It prohibits CPR and other medical procedures from being used to re-start the heart. A DNR can be used only in a non-hospital setting, and it must be available to the emergency personnel called upon to administer CPR. Michigan law allows a person to wear a special bracelet to reflect their desire not to be resuscitated. DNR orders are specifically recognized by the *Michigan Do-Not-Resuscitate Act*.

*Strengths:* (1) Statutory form means that DNR's will be uniformly administered. (2) Simple to fill out and understand. (3) Based on advice and counsel of physician.

*Weaknesses:* (1) DNR is only relevant where a person's heart and breathing are stopped, and it contemplates CPR as the only form of life support. (2) DNR must be seen and read by emergency personnel, or the patient must wear an authorized bracelet. (3) Must be signed by a physician. (4) Applicable only outside of a hospital set-

ting.

**8. Organ Donation Registry** - The “Gift of Life Registry” was established by Michigan law in 2003. It is a centralized records system that contains subscriber’s wishes about anatomical gifts. The organ donation registry is helpful when the Medical Durable Power of Attorney or driver license registration cannot be found. Forms to donate organs are available on the State of Michigan website. The donor registry is accessed each time a patient dies in a Michigan hospital.

*Strengths:* (1) Centralized records systems allows registry to be accessed regardless of which hospital is administering care. (2) Forms provided free by State of Michigan.

*Weaknesses:* (1) General lack of awareness and education about this service. (2) Irrevocable by family members or the patient advocate even if they decide it is not what the donor would have wanted. (3) Must be consistent with other advance directives. (4) Relevant only to organ donation.

**9. Values History Form** - Allows a person to state their background and preferences about health care, treatment, and end-of-life decisions. The best form was developed by the University of New Mexico Center for Health Law and Ethics. It contains more than 40 questions regarding a person’s attitude towards life, personal relationships, finances religion, illness, death, and dying. The form includes such questions as “What general comments would you like to make about medical treatment?”

*Strengths:* (1) Attempts to incorporate a variety of social, financial, and family values into end-of-life decisions, rather than purely medical criteria.

*Weaknesses:* (1) Not a binding legal document. (2) Vague unless completed in great detail. (3) Very cumbersome to fill out. (4) May not give specific direction to family members or other care givers.

**10. Long Term Care/Chronic Illness Advance Directive** - Sets forth the preferences and

logistics on placement, care, access, safety and supervision for geriatric patients. It is primarily used in a nursing care setting, and contains information regarding how a person wishes their long term care needs to be met.

*Strengths:* (1) Based upon discussion with experienced geriatric care providers.

*Weaknesses:* (1) A “plan of care” is not a legally recognized or enforceable document in Michigan since it does not meet the criteria of a PAD. (2) Not useful for patients who are incapacitated.

**11. Five Wishes Form** - A form booklet attempting to combine the separate functions of the living will, the medical durable power of attorney, the values history form in plain English.

Wish 1: Provides for a health care agent and specific powers (MDPOA);

Wish 2: Sets forth desires on life support (Living Will);

Wishes 3-5: Sets forth personal, spiritual and emotional preferences during end-of-life care (Values History Form).

*Strengths:* (1) Attempts to combine several advance directives into one document.

*Weaknesses:* (1) Does not include a written acknowledgment by the health care agent (patient advocate) as required under Michigan law. (2) Single form document not drafted under professional advice, or tailored to meet the patient’s specific wishes. (3) Revokes all previous advance directives even if that outcome was not intended. (4) Relatively cumbersome to fill out. (5) Not uniformly recognized or distributed.

Advance directives can take many forms, and result in a great deal of misunderstanding about how they are used. We hope that this survey has encouraged you to make an advance directive part of your own estate plan. Please call our office if you have additional questions.



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